

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

August 17, 2010

Ricky Hicks
SBI# 004
Medium C-Tier
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

RE: *State of Delaware v. Ricky Hicks*, Def. ID# 0410023146A (R-2)

DATE SUBMITTED: June 1, 2010

Dear Mr. Hicks:

Pending before the Court is defendant's motion for correction of an illegal sentence pursuant to Superior Court Criminal Rule 35(a) ("Rule 35(a)"), and alternatively, motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). To the extent this is considered a motion for postconviction relief, it constitutes defendant's second such motion. The law so clearly requires denials of defendant's motions that no need exists to hold a hearing in this matter, and accordingly, I deny defendant's request for a hearing. This is my decision denying both the Rule 35(a) and Rule 61 motions.

In April, 2005, a jury found defendant guilty of the charges of trafficking in cocaine, delivery of cocaine and possession of drug paraphernalia. A presentence investigation report was

ordered. Defendant's sentencing was scheduled for July 8, 2005.

On June 22, 2005, the State of Delaware ("the State") filed a motion, pursuant to 11 *Del. C.* § 4214(b),¹ to declare defendant an habitual offender on the offenses of trafficking in cocaine and delivery of cocaine. In support of that motion, the State submitted certified copies of documents establishing defendant had the prerequisite convictions for being sentenced, on each of the two convictions, to life as an habitual offender.

The documents established the following information.

On October 1, 2002, defendant was convicted, by way of a plea agreement, on a charge of possession with intent to deliver cocaine in the case of *State v. Hicks*, Def. ID# 0208015595 ("*Hicks I*"). He was sentenced on that date to a period of incarceration, followed by a period of probation.

On September 7, 2004, in the case of *State v. Hicks*, Def. ID# 0403021158 ("*Hicks II*"), defendant was convicted, by way of a plea agreement, on a charge of possession with intent to deliver cocaine. The sentence required successful completion of Level 5, Boot Camp. This was not the Boot Camp Diversion program as established under 11 *Del. C.* § 6712 because defendant was not a first offender. Instead, it was the intensive incarceration program established under the other provisions of Chapter 67, 11 *Del. C.* The plea agreement specifically states that the Boot

¹In 11 *Del. C.* § 4214(b), it is provided in pertinent part as follows:

Any person who has been 2 times convicted of a felony ... hereinafter specifically named, under the laws of this State ... and who shall thereafter be convicted of a subsequent felony hereinafter specifically named, ... is declared to be an habitual criminal, and the court in which such third or subsequent conviction is had, in imposing sentence, shall impose a life sentence upon the person so convicted....

Camp sentence was non-diversion. After successfully completing Boot Camp, defendant's sentence was to be suspended for probation at Level 3. Defendant was to be held at Level 3 probation until space was available at Level 5, Boot Camp. Since, at the time defendant was arrested on the charges in the case of *Hicks II*, he was on probation in *Hicks I*, the arrest resulted in a violation of probation in the case of *Hicks I*. As a part of the plea agreement in these matters, defendant was sentenced on his violation of probation in *Hicks I* to 18 months at Level 3 probation, which was concurrent to the sentence imposed in *Hicks II*.

I return to the facts of this case, *State v. Hicks*, Def. ID# 0410023146A ("*Hicks III*"). On October 29, 2004, when defendant was arrested on the charges which resulted in the conviction in *Hicks III*, defendant was on probation at Level 3 while awaiting entry into Level 5, Boot Camp. Defendant has explained in the current motion that he reported to Boot Camp but because of an injury, he was not allowed into the class as planned. No matter what the reason for him not being in Boot Camp, he was on Level 3 probation at the time of his arrest.

The habitual offender status hearing and the sentencing took place on July 8, 2005. A review of the Transcript of the July 8, 2005, Sentencing Proceedings (hereinafter "TT at ___"), shows the following. Defendant's attorney ("trial counsel") received a copy of the motion to declare defendant an habitual offender. TT at 3. Trial counsel's office did not send the motion to defendant at Sussex Correctional Institution; thus, defendant did not have the opportunity to review the motion until the morning of sentencing. *Id.* at 3-4. However, defendant did review the motion before the hearing. *Id.* Consequently, there was no prejudice in defendant not receiving the motion before the day of the hearing. The prerequisites of designating defendant an habitual offender and sentencing him to life imprisonment were present. Trial counsel and the prosecutor

noted that because of defendant's previous convictions, the Court had no choice but to sentence defendant to life in prison. *Id.* at 4 -5. After reviewing the motion, the Court found "that the State has shown beyond a reasonable doubt that Mr. Hicks has two prior convictions for violent felonies, which are set forth in the motion supported by certified copies of court documents, which make the application as presented required to be approved by the Court." *Id.* at 5. The Court signed the order. It then turned to the defense, providing trial counsel and defendant with the opportunity to speak before it imposed sentence. The Court also considered the violation of probations in *Hicks I* and *Hicks II*. The Court thereafter imposed sentences in the various matters. It sentenced defendant to life on the trafficking conviction and to life on the possession with intent to deliver conviction as the State requested. The Court also imposed other sentences on other charges.

Defendant appealed to the Supreme Court, but did not raise any issue concerning the applicability of the habitual offender statute. *Hicks v. State*, 913 A.2d 1189 (Del. 2006). The Supreme Court affirmed the judgment of the Superior Court. *Id.* Thereafter, defendant filed a postconviction motion which did not raise any issue concerning the applicability of the habitual offender statute. This Court denied his Rule 61 motion. *State v. Hicks*, 2008 WL 73711 (Del. Super. Jan. 7, 2008), *app. dismiss.*, 966 A.2d 348, 2009 WL 189052 (Del. Jan. 23, 2009) (TABLE). Defendant filed this current motion on May 24, 2010, nearly 5 years after his sentence was imposed and over 3 years and 6 months after the Supreme Court's mandate affirming defendant's convictions.

Defendant's motion is one to correct an illegal sentence, or, in the alternative, for postconviction relief.

In Rule 35(a) and (b), it is provided in pertinent part as follows:

(a) *Correction of sentence*. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) *Reduction of sentence*. The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. This period shall not be interrupted or extended by an appeal, except that a motion may be made within 90 days of the imposition of sentence after remand for a new trial or for resentencing. ... The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances

Defendant advances several arguments which, if valid, would support his contention that the prerequisites for sentencing him as an habitual offender were not met and consequently, the sentence is illegal. Such arguments are not time-barred since an illegal sentence may be corrected at any time. *Kelly v. State*, 911 A.2d 803, 2006 WL 3053305, * 1 (Del. Oct. 27, 2006)(“Relief under Rule 35(a) is available when the sentence imposed ... is a sentence that the judgment of conviction did not authorize. *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998)”).

Defendant argues that his sentence in *Hicks II* was a diversionary one; i.e., he did not actually have a conviction, and would not have one, unless he failed in Boot Camp. Consequently, he argues he did not have the qualifying predicate offenses to be sentenced as an habitual offender. Defendant’s position is factually wrong. This was not a diversionary sentence in any manner. Thus, this argument is meritless.

Defendant also argues that because he was arrested before he ever reached Boot Camp, he did not have the opportunity for rehabilitation and thus, was not subject to be sentenced as an habitual offender. Defendant additionally argues that he did not have a conviction in *Hicks II* until he was declared in violation of probation in that matter, and that declaration occurred after the habitual offender hearing.

In order to be sentenced as an habitual offender, a defendant must have prior separate qualifying convictions to serve as the predicate offenses, with some chance for rehabilitation after each sentencing. *Hall v. State*, 473 A.2d 352 (Del. 1984). As explained most recently in *Ross v. State*, 990 A.2d 424, 430 (Del. 2010):

This Court explained [in *Hall v. State, supra*] that the justification for declaring an individual an habitual criminal and possibly imposing a life sentence is that the “offender has committed still a third offense after having had two prior convictions followed by two separate chances to reform.” *Hall v. State*, 473 A.2d 352, 356 (Del. 1984).

Thereafter, at page 430, the Court further explained:

This Court recognized [in *Hall v. State, supra*, and *Buckingham v. State*, 482 A.2d 327 (Del. 1984)] that “the legislature intended to reserve the habitual offender penalties for those individuals who were not rehabilitated after the specified number of separate encounters with the criminal justice system and a corresponding number of chances to reform.” [Footnote and citation omitted.]

Incarceration is not required; being held on probation for the second conviction was sufficient to qualify the conviction in *Hicks II* for habitual offender purposes. *Wehde v. State*, 983 A.2d 82 (Del. 2009); *Whiteman v. State*, 846 A.2d 239, 2004 WL 692010 (Del. March 25, 2004) (TABLE), *cert. den.*, 543 U.S. 850 (2004). Nor is participation in a treatment program of any kind, including one for drugs, required. *Kirby v. State*, 738 A.2d 238, 1999 WL 734743 (Del. Sept. 9, 1999) (TABLE); *State v. Walker*, 2002 WL 32071668 (Del. Super. July 10, 2002). All that is required is a chance at rehabilitation. *Hall v. State*, 473 A.2d at 356-57. As explained in *Eaddy v. State*, 679 A.2d 469, 1996 WL 313499, * 2 (Del. May 30, 1996) (TABLE):

Although a defendant must have been given “some chance for rehabilitation” before he may be sentenced as an habitual offender, this Court has held that “some chance for rehabilitation” means only that some period of time must have elapsed between sentencing on an earlier conviction and the commission of the offense resulting in the later felony conviction. *Hall v. State*, Del. Supr., 473 A.2d 352, 357

(1984)(discussing 11 *Del. C.* § 4214(b)).

There is no set time frame between the preceding conviction and the arrest; **some** period of time is all that is required. *Whede v. State*, 983A.2d at 86; *Henry v. State*, 945 A.2d 594, 2008 WL 623208, *3 (Del. March 7, 2008) (TABLE); *Brown v. State*, 707 A.2d 765, 1998 WL 138937, *1 (Del. March 2, 1998) (TABLE); *Johnson v. Butler*, 655 A.2d 307, 1995 WL 48368, *1 (Del. Jan. 30, 1995) (TABLE); *State v. Dixon*, 2007 WL 2694395, *4 (Del. Super. Sept. 14, 2007), *aff'd*, 956 A.2d 642, 2008 WL 342755, *2 (Del. Feb. 7, 2008) (TABLE).

The prerequisite offenses existed; the habitual offender determination was valid and the life sentences are not illegal. The arguments asserting a lack of prerequisite offenses fail.

Defendant also attacks the legality of imposing life sentences on each of the convictions of trafficking in cocaine and delivery of cocaine. He maintains only one life sentence could be imposed. His argument is legally incorrect. Each separate qualifying conviction on which the State sought sentencing as an habitual offender required a separate sentence. *Hawkins v. State*, 792 A.2d 189, 2002 WL 384436 (Del. March 6, 2002) (TABLE); *Reeder v. State*, 783 A.2d 124, 2001 WL 355732 (Del. March 26, 2001) (TABLE), *rearg. den.*, 2001 WL 760857 (Del. May 21, 2001). The State sought habitual offender sentencing on the offenses of trafficking and delivery. The Court imposed the sentences as required.

In conclusion, none of defendant's arguments asserting an illegal sentence are of merit and the Court denies defendant's motion to correct an illegal sentence.

Defendant's other arguments are based upon contentions that the sentencing was imposed in an illegal manner or otherwise improper. These arguments are time-barred pursuant to Superior Court Criminal Rule 35, because they were not brought within 90 days of the sentences'

impositions. Alternatively, they are procedurally barred under Rule 61 because they are time-barred and/or because defendant failed to raise them in previous proceedings. Rule 61(i)(1), (2) and (3).² Defendant argues the bars do not apply because of the existence of exceptions to the procedural bars, i.e., extraordinary circumstances in the Rule 35 situation or miscarriage of justice in the Rule 61 situation.

Although defendant has not established the existence of these exceptions, his arguments would fail on the merits even if considered.

²The version of Superior Court Criminal Rule 61(i) applicable to defendant's case provides as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than **one year** after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than **one year** after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction. [Emphasis added.]

First, I set forth the procedural requirements of sentencing someone as an habitual offender. In 11 *Del. C.* § 4215, it is provided in pertinent part as follows:

(b) If, at any time after conviction and before sentence, it shall appear to the Attorney General or to the Superior Court that, by reason of such conviction and prior convictions, a defendant should be subjected to § 4214 of this title, the Attorney General shall file a motion to have the defendant declared an habitual criminal under § 4214 of this title. If it shall appear to the satisfaction of the Court at a hearing on the motion that the defendant falls within § 4214 of this title, the Court shall enter an order declaring the defendant an habitual criminal and shall impose sentence accordingly.

In Superior Court Criminal Rule 32(a)(3), it is provided:

Habitual criminal; greater sentence. The attorney general shall file a motion to declare the defendant an habitual criminal pursuant to 11 *Del. C.* § 4214 promptly after conviction and before sentence. Whenever it appears that a defendant may be subject to a greater sentence because of a previous conviction, the court shall proceed in accordance with 11 *Del. C.* § 4215.

Defendant argues that he should have been notified before the trial that he was subject to being sentenced as an habitual offender. He argues that giving notice after trial and before sentencing “defeats the purpose of the habitual offender statute as a deterrent and prevented petitioner from negotiating a plea agreement to less than life imprisonment.” Petitioner’s Memorandum of Law at 2.

First, the purpose of the rule and statute is not to provide a defendant with the opportunity to negotiate a plea to a crime which will not render him subject to the habitual offender statute; instead, it is to take a violent offender “off the streets because he is deemed to be incorrigible.” *Hall v. State*, 473 A.2d at 356. The statute and rule require that the notice be provided after trial and before sentencing. That is the procedure the State followed. Defendant’s argument is meritless.

Defendant argues that the State failed to personally serve him with the motion. The State served defense counsel with the motion. The State is not allowed to contact defendant directly because trial counsel represented him. Thus, defendant's argument he was not personally served is meritless. Furthermore, it was trial counsel's office which failed to send the motion directly to defendant. To the extent defendant asserts an ineffective assistance of counsel claim, that claim fails on its merits if considered. Defendant did not suffer any prejudice because trial counsel went over the motion with defendant and because the two previous convictions defendant had mandated that an habitual offender determination be rendered.

Defendant argues that his rights were violated because the habitual offender hearing and the sentencing took place at the same time.

The Supreme Court ruled, in *Bailey v. State*, 450 A.2d 400, 404 (Del. 1982), that although the habitual offender status hearing and the sentencing of a defendant can be conducted on the same day, the status hearing should be separate from the sentencing. In this case, that occurred. The Court determined that the State had shown beyond a reasonable doubt that defendant had the prerequisite offenses and it deemed him an habitual offender. TT at 5. Thereafter, the Court proceeded with the sentencing, after giving trial counsel and defendant the opportunity to speak.

Defendant has the burden of showing that actual prejudice resulted from combining the hearings. *Kirby v. State*, 708 A.2d 631, 1998 WL 184492 (Del. April 13, 1998). Defendant has not made any attempt to show prejudice. Defendant's rights were protected with regard to the habitual offender proceedings. The requisite convictions were established. Defendant was afforded the opportunity to hear and confront the evidence against him. Defendant was provided the opportunity to speak. Furthermore, a record was made in the event defendant desired to appeal the

matter. There was no prejudice to defendant in holding a combined hearing. *Id.*; *Bailey v. State*, 450 A.2d at 405. This argument regarding the failure to have two separate hearings fails.

Defendant also asserts an ineffective assistance of counsel claim, arguing that trial counsel's delay in reviewing the motion with him prevented him from raising the issues that the conviction in *Hicks II* was not final and consequently, the prerequisites for being declared an habitual offender were not present. This claim is procedurally barred, Super. Ct. Crim. R. 61(i)(1) and (2), and defendant has failed to show a miscarriage of justice overcomes these bars. However, even if the Court considered the claim, it fails. The prerequisite convictions for declaring defendant an habitual offender existed. Trial counsel had no factual or legal basis for arguing they did not exist. Thus, defendant cannot establish trial counsel was ineffective. This claim fails.

In conclusion, the Court denies defendant's request for an evidentiary hearing and denies the alternative motions.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
David Hume, IV, Esquire
John F. Brady, Esquire .